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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

UNITED STATES OF AMERICA,
ex rel. HENRY F. COBELL,

Respondent,

-vs-

THE HONORABLE JOHN P. SHARP
and THE BLACKFEET TRIBAL COURT,

Petitioners.

BRIEF OF APPELLEE

Henry F. Cobell, appellee herein, respectfully submits that the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case on September 5, 1974, be denied.

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked under Title 28, U.S.C., Section 1254(1); 25 U.S.C., Section 1303; and 28 U.S.C., Sections 1291 and 2253; and pursuant to Rule 41, Rules of the Supreme Court, Title 28, Appendix, page 7694.

STATEMENT OF THE CASE

This case involves the custody of two children born of

the marriage of Joan R. Cobell and Henry F. Cobell. They were married October 17, 1963, at Cardston, Alberta, Canada. The two children are Rodney Dale Cobell and Venetta Lynn Cobell. The parents are Indians and enrolled members of the Blackfeet Indian Tribe. The children, although they have Indian blood in them, have insufficient percentage of Indian blood to qualify as enrolled members of the Blackfeet Tribe. In August, 1971, while the couple were residents of Great Falls, Montana, Joan R. Cobell filed for divorce in the state District Court of the Eighth Judicial District, in and for the County of Cascade. The parties had been residents of Montana for more than a year preceding the commencement of the divorce action. She asked for a divorce, for the care, custody and control of the two children, and for child support payments.

Henry F. Cobell answered the allegations to the complaint on file, counterclaimed and requested the court to grant him a divorce, and he asked for the care, custody and control of the two minor children.

On December 22, 1971, with both parties submitting to the jurisdiction of the state District Court, said court held a hearing and granted a divorce to both Joan R. Cobell and Henry F. Cobell, one from the other. The court also declared that the defendant, Henry F. Cobell, was to have the care, custody and control of the two minor children. The court further ordered that the Court of Conciliation of the Eighth Judicial District of the State of Montana should make an immediate study of the needs of the children and the type of home each of the parties was able to provide for the said children, and asked the Court of Conciliation to secure the assistance of the Mental Hygiene Clinic in this regard.

Subsequent to that order the plaintiff, Joan R. Cobell,

petitioned the court for an order changing the custody of the two minor children to the plaintiff, Joan R. Cobell. On August 14, 1972, without a hearing, the court ordered the minor children to be changed to the temporary custody of Joan R. Cobell. A show cause hearing was set for the 14th day of September, 1972, regarding the change of the custody. However, the state District Court, without affording the defendant a substantive hearing, granted the temporary custody of the two minor children to the plaintiff, Joan R. Cobell.

On September 19, 1972, Mr. Cobell petitioned the Montana Supreme Court for a Writ of Prohibition, asking relief from that court and for an order rescinding the District Court's order granting temporary custody to Joan R. Cobell. On September 19, 1972, the Montana Supreme Court issued a show cause order to the state District Court to appear on September 28, 1972, to show cause why Mr. Cobell should not receive the relief he prayed for in his writ. Subsequent to the show cause order being issued, the state District Court deleted from its order of September 14, 1972, that portion relating to the custody of the children being granted to Joan R. Cobell. Accordingly, the temporary custody of the two children remained with Henry F. Cobell.

In the meantime, Joan R. Cobell took the two children to Browning, Montana, located on the Blackfeet Indian Reservation. When the order of the Montana Supreme Court came down, Mrs. Cobell took the two children out of the public school system and fled to unknown places for approximately three weeks.

By order of the state District Court, dated September 26, 1972, the said District Court reinforced its order that the custody of the two minor children should be with their

father, Henry F. Cobell, and that Joan R. Cobell should immediately return the children to their father. The court also issued orders to the sheriff to insure that the provisions of the order were complied with. Joan R. Cobell refused to comply with the order and continued to refuse to obey the order of the Montana Supreme Court and the state District Court. On October 11, 1972, the state District Court issued a warrant of attachment for the arrest of Joan R. Cobell, setting bail in the sum of one thousand and no/100 dollars ($1,000.00).

On or about October 6, 1972, through an order drafted by an attorney at law (Tr. 22, line 4) and signed by Judge John Sharp, the Blackfeet Tribal Court asserted temporary care, custody and control over the two minor children and ordered that the minor children not be removed from the Blackfeet Indian Reservation. This is the first case of this type to occur on the Blackfeet Indian Reservation (Tr. 26, lines 8,9).

It is undisputed that Henry F. Cobell and Joan R. Cobell are residents of Montana and are also enrolled members of the Blackfeet Tribe. However, the two minor children are non-members of the Blackfeet Tribe (see Exhibit "1" attached to Appellee's Brief submitted in lower court, which indicates the qualifications for membership in the Blackfeet Tribe; and also Exhibit "2" attached to said brief, indicating that the two children are not enrolled in the Tribe). Further, from a reading of Ordinance No. 14, Section 2(b) and (c) of the Blackfeet Reservation of Montana, it appears that the two children are not eligible for enrollment in the Tribe. It is undisputed that both father and mother voluntarily submitted themselves to the jurisdiction of the state District Court of the Eighth Judicial District in order to have their marriage dissolved and to have the issue of the care, custody

and control of the two minor children determined by that court.

Joan R. Cobell was served with the petition for writ of habeas corpus and order to show cause in this matter on October 18, 1972. She failed to honor said documents and did not appear at said hearing held on October 25, 1972 (Tr. 3 and 4).

ARGUMENT SUMMARY

While the principal concern of appellee arises to sustain the court in its holding that the writ of habeas corpus be granted, we will discuss the main issues fully.

1. Jurisdiction of Federal District Court in this habeas corpus proceeding.

2. The lack of jurisdiction of the Blackfeet Tribal Court in this matter.

3. The jurisdiction of Montana courts.

In addition, the Petition for Writ of Certiorari brings up the following questions:

1. Whether Indian Tribal Court remedies must be exhausted before seeking a writ of habeas corpus from a U.S. District Court.

2. Whether Indian Tribal Courts must give full faith and credit to state court judgments.

3. Whether the action of the Blackfeet Indian Nation, by transferring jurisdiction over marriage, divorce and related matters to courts of the state of Montana, can be upheld.

4. Whether the Blackfeet Tribal Court could assume

jurisdiction over Blackfeet Indian children found on the Blackfeet Indian Reservation, even though there is an outstanding interlocutory state court decree concerning the custody of the children.

ARGUMENT

JURISDICTION OF FEDERAL DISTRICT COURT IN THIS HABEAS CORPUS PROCEEDING

The Federal District Court has jurisdiction over this matter under the provision of 25 U.S.C., Section 1303, which reads as follows:

> "The privilege of the Writ of Habeas Corpus shall be available to any person, in a Court of the United States, to test the legality of his detention by order of an Indian Tribe."

The one objection by petitioner is that it is alleged that Mr. Cobell did not exhaust his available Tribal Court remedies before seeking a writ of habeas corpus. The exhaustion of remedies argument is clearly and completely covered by the United States District Judge Battin below, and by the United States Circuit Judge Trask below. In their opinions, found in Exhibits "A," "B," and "C" to the Petition for Writ of Certiorari, starting on pages 31, 45 and 61, respectively, Judge Trask held:

> "We concur with the view expressed by the Eighth Circuit that 'exhaustion is not an inflexible requirement.' *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140. The court there observed:
>
> " 'A balancing process is evident; that is weighing the need to preserve cultural identity of

> the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights. Thus, this Court must determine whether exhaustion is appropriate in the case at bar.' " (page 1146)

The Circuit Court concluded that the District Court was correct when it concluded that Henry Cobell lacked meaningful remedy in the Tribal Courts. The restraining order issued by Judge Sharp of the Tribal Court contained no invitation to participate in tribal appellate processes. Rather, the ex parte order, although designated as "temporary," spoke with a tone of finality. More significantly, however, is the fact that Judge Sharp testified that he had issued the restraining order to test tribal jurisdiction, and that only a Federal Court order would cause him to rescind the action.

LACK OF JURISDICTION OF THE BLACKFEET TRIBAL COURT IN THE MATTER

This question also includes the argument listed as No. 4 by the Petition for a Writ of Certiorari.

First of all, the children were not enrolled members of the Blackfeet Indian Tribe. As pointed out above, they do have Indian blood in them, but of insufficient percentage to allow them to be enrolled as members of the tribe. Therefore, they are actually non-enrolled members of the tribe on the Blackfeet Indian Reservation. The Blackfeet Tribal Court simply did not have jurisdiction over them. The Tribal Council's jurisdiction is one of limitation. Article 6, Section 1(k) of the Constitution and By-laws for the Blackfeet Tribe of the Blackfeet Indian Reservation specifically establishes minor courts for the adjudication of claims or disputes

arising amongst the members of the tribe and for the trial and punishment for members of the tribe charged with the commission of offenses.

This is not a criminal matter. Even though the mother and father, the parties to this litigation, are enrolled members of the tribe, their two children are not. The parties to the litigation have consented to the jurisdiction of the state District Court for the very purpose of terminating the marriage and adjudicating the custody of the children. This case concerns two children, who, by state court order, are to be in the custody of their father, who resides in Montana but not on the Indian Reservation.

The Tribal Law and Order Code clearly demonstrates that the tribe did not consider the area in question essential to tribal self-government. The Tribal Law and Order Code specifically waives Tribal Court jurisdiction, if any it had to waive, in favor of the State of Montana. This is clear reference to and acknowledgment of the fact that the state District Courts of Montana have jurisdiction over the marriage, the divorce and the child custody.

The Law and Order Code, in Chapter 2, Section 1, Jurisdiction, clearly limits jurisdiction to *members* of the tribe. Where you have a mixture of members and non-members, there would have to be specific congressional authorization for the Tribal Courts to have jurisdiction over these children -- none exists.

The Montana Supreme Court in *In the Matter of Cantrell*, 159 Mont. 66, 495 P.2d 179, decided in 1972, in which an Indian mother objected to the jurisdiction of the state court in declaring her child dependent and neglected. The Montana Supreme Court held:

"The District Court ruled that it had jurisdic-

> tion because the child was physically in the county and off the reservation when the petition was filed. That is the sole issue here."

The Indian mother based her appeal on what she called the fact that there is no evidence of acts of neglect attributable to her occurring outside the exterior boundaries of the reservation. Thus, she reasoned, the state courts have no jurisdiction. The mother's only effort to all practical purposes was to remain in the sanctuary of the reservation, oblivious to the needs of her child. This was the unanimous opinion of the Montana Supreme Court.

Judge Trask, in the opinion of the Circuit Court of Appeals, Appendix "A" to the Petition for a Writ of Certiorari, held:

> "This is a unique child custody struggle involving the conflicting jurisdictional claims of the Montana state courts and the Blackfeet Tribal Court. The controversy comes before us on appeal from the granting of a writ of habeas corpus by the federal district court pursuant to 25 U.S.C. Section 1303."

The court further held:

> "We therefore turn to the primary jurisdictional issue involved in this appeal. The State of Montana's interest in the welfare of the Cobell children is beyond dispute. The children were domiciled in the state and enrolled in the state public school system when Joan and Henry Cobell began their divorce proceedings. Presence, domicile and jurisdiction over the parents are well recognized bases for the assertion of jurisdiction to determine

> child custody. Restatement (Second) Conflict of Law, Section 79 (1971). Even more pertinent is Mont. Rev. Stat. Tit. 21, Section 138 (1947) which states:
>
> " 'In an action for divorce the court or judge may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.'
>
> "Thus, by voluntarily invoking the state court's jurisdiction for divorce purposes, the Cobells clearly submitted the question of their children's custody to the judgment of the Montana state courts."

The court further held that the jurisdiction of the Blackfeet Tribal Court is limited and does not extend to the full range of domestic relations incidents.

JURISDICTION OF MONTANA COURTS

The Constitution of Montana, Article VII, Section 4, and Section 93-318, R.C.M. 1947, give the several District Courts in the state original jurisdiction in all cases at law and in equity, including divorce actions. Before a person can obtain a divorce, he or she must be a resident of the state for one year next preceding the commencement of the action. (Section 21-134, R.C.M. 1947) Further, Section 21-138, R.C.M. 1947, mandates that the court's jurisdiction is continuing as far as child custody matters are concerned until the child becomes an adult. See also, *Barbour v. Barbour*, 134 Mont. 317, 330 P.2d 1093, 1095 (1958). The children are and continue to be wards of the court. See

27B, C.J.S., Divorce, Section 303. Thus, the state District Court has continuing jurisdiction in the matter. Once the court acquires jurisdiction, it cannot be deprived of it, even if the children were removed from its jurisdiction, which, of course, is not the case here. *State v. District Court*, 195 P.2d 549 (Mont. 1920).

Federal courts have consistently held that domestic relations cases are within the jurisdiction of the state courts. For example, in the case of *McCarthy v. Hollis*, 210 F.2d 540 (10 C.A. 1941), involving a divorce action and other incidental matters between an enrolled Indian and his wife, the court, citing many cases, including the United States Supreme Court decisions, said this:

> "It has been consistently said without deviation that the field of domestic relations affecting husband and wife, or parent and child, belongs exclusively to the laws of the states."

At no time do the petitioners argue that the state District Court does not have jurisdiction. In effect, the Tribal Court has attempted to usurp the jurisdiction and the power of the state judicial system of Montana. It has functioned as sort of an appellate court in the matter, but the Tribal Court has not cited any authority upon which to base such premises.

What petitioners are attempting, if successful, would be a dangerous precedent inviting others to ignore and violate court orders, be they state court or federal court orders, whenever a ruling is made against their interests. All they would have to do is run to a reservation and claim they are protected.

In *Paiz v. Hughes*, 417 P.2d 51 (N.M. 1966), where an Indian filed a wrongful death action in state court, the

court said:

> "When Indians do invoke the jurisdiction of state courts, they are bound by the decisions of these courts, and they cannot be heard to complain of the adjudication by these courts of all claims and issues which can be and are properly asserted by or against them in suits which they have initiated." Citing *United States v. Candelaria*, 271 U.S. 432, 46 S.Ct. 561, 70 L.Ed. 1023, *Mars v. McDougal*, 40 F.2d 247 (1930), and other cases.

Most of the arguments of petitioner have been answered in the above discussion, and we will here comment only briefly on the four issues which petitioner has stated. Item 3, concerning the Blackfeet Indian Nation by tribal Ordinance transferring jurisdiction over marriage, divorce and related matters to courts of the State of Montana, assumes that the Indian Nation had jurisdiction over these matters to begin with, but the Blackfeet Tribal Law and Order Code is one of limited jurisdiction, as argued above. In the District Judge's memorandum, opinion, order and judgment, found in Appendix B to the Petition for a Writ of Certiorari, starting on page 45 and continuing to page 51, Judge Battin states:

> "4. Respondents conclude that this court has made an erroneous assumption regarding the extent of Tribal Government authority without specific grant by Congress. The court recognizes that Tribes possess such power as not limited by Congress. But that principle is not that upon which this court predicated its decision. When the court noted that it could find no controlling Federal legislation which would justify the order of the Tribal Court,

this court was not assuming that an Indian Tribe requires a grant of power by Congress to act regarding matters essential to Tribal self-government. It is clear from *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959), that '. . . the Indian Tribes retain exclusive jurisdiction over essential matters of Reservation government in the absence of specific Congressional limitation, . . .' *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 684 (9th Cir. 1969). But we do not here deal with matters within the exclusive jurisdiction of Indian Tribes for we do not deal with matters which are essential to Reservation government. Instead, we are in an area where a Tribe has acted in disregard of the powers of a sovereign state. By doing so, the Tribe erects a barrier between it and the sovereign state. It is the belief of this court that before a Tribe of Indians may so interfere with the powers of the sovereign government of any state, it needs a Congressional grant of authority. Finding no such grant, I find the order of the Tribal Court in this case to be invalid."

SUMMARY AND CONCLUSION

It is the position of your appellee that the jurisdiction is in the state District Court. The marriage of the Cobells was contracted outside of the jurisdiction of the Blackfeet Indian Reservation. The couple, as married people, were residents of the State of Montana and resided in Great Falls, Montana, outside of the Indian Reservation. The parties voluntarily submitted themselves to the state judicial process

for determination of the child custody and divorce issues. The children are not members of the Blackfeet Tribe, nor are they eligible to become enrolled members of the Blackfeet Tribe. Actually, the only relationship the two children have, or the marriage and divorce had, with the Blackfeet Indian Reservation was subsequent to the divorce when the mother took the children, in contravention of state court orders, and lived within the confines of an Indian Reservation.

Further, the Constitution of the Blackfeet Tribe and the Blackfeet Tribal Law and Order Code clearly demonstrate that the Tribal Court lacks jurisdiction over the persons or subject matter. It has no authority whatsoever to set itself up as an appellate court or a court having supervisory power over the Montana judicial process.

For the foregoing reasons, we pray that the Petition for Writ of Certiorari be denied, and that the decision and order of the Circuit Court of Appeals be upheld.

Respectfully submitted this 12th day of May, 1975.

D. PATRICK McKITTRICK
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Great Falls, Montana 59405

/s/ D. Patrick McKittrick
Attorney for Appellee

AFFIDAVIT OF SERVICE

State of Montana)
County of Lewis and Clark) ss.

I, D. Patrick McKittrick, attorney for the herein, depose and say, that on the 12th day of May, 1975, I served the foregoing Brief of Appellee upon the parties herein by depositing full, true and correct copies (3 copies to each) thereof in the United States mail, postage prepaid, addressed as follows:

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